Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE ERIC BALL,

Petitioner

MOTION FOR LEAVE TO FILE
PETITION FOR A WRIT OF HABEAS CORPUS

PETITION FOR A WRIT OF HABEAS CORPUS

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69pp

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to S.Ct. Rules 17 and 20, Petitioner moves this Court for leave to file a Petition for Writ of Habeas Corpus as an original action in the United States Supreme Court.

In *Hohn v. United States*, 524 U.S. 236 (1998), the Supreme Court ruled that where a criminal defendant petitioner lost a Petition for Habeas Corpus, and the courts would not grant a Certificate of Appealability, the petitioner could nonetheless seek review by way of an original Petition for Habeas Corpus filed in the United States Supreme Court, under "extraordinary circumstances."

The extraordinary circumstances in this case are as follows:

(1) On the Fourth Amendment question, much of it was never decided by the state or federal courts. Therefore, the rationale of *Stone v. Powell*, 428 U.S. 465 (1976) should not have been applied to bar Habeas Corpus review. This case presents the issue of whether the rule of *Stone v. Powell* is a rule of deference to state court process, as submitted by Petitioner, or is a rule that simply bars all Fourth Amendment consideration, whether the state has addressed the issue or not.

(2) On that portion of the Fourth Amendment claim that the state court did decide, the state court directly went against established United States Supreme

Court case rulings. This case presents the issue of whether the rule of *Stone v. Powell* is a rule of deference to reasonable state court rulings, as submitted by Petitioner, or is a rule that allows state courts to behave in a lawless manner and reject United States Supreme Court authority simply because a Fourth Amendment question is involved.

(3) The District Court and Sixth Circuit did not follow the standards of *Barefoot v. Estelle*, 463 U.S. 880 (1983) for deciding on a Certificate of Appealability, as to the question of prosecutor misconduct, and as to the question of insufficient evidence, because the only rationale stated was that the state court and District Court had already ruled against Petitioner.

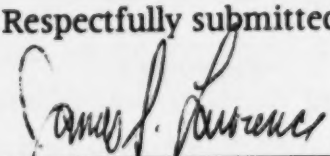
(4) The evidence elicited against Petitioner at trial was in fact insufficient to support his conviction. The United States Supreme Court presents the last and only opportunity for an innocent person convicted on insufficient evidence to get justice.

(5) The completely unreasonable finding that there is no issue here worthy of discussion is itself an additional extraordinary circumstance.

This case should be accepted and a ruling issued on the merits to determine the contours of *Stone v. Powell* when the state court fails to rule, the contours of that case when the state court unreasonably fails to follow clear United States Supreme Court authority, and the standards to be used in denying a Certificate of

Appealability. Where the evidence is insufficient to convict, it is a miscarriage of justice to decline review. The effect of refusing review of an insufficient evidence claim is to promote injustice for all defendants so convicted, a circumstance that a national Supreme Court is uniquely situated to remedy.

Respectfully submitted,



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Dated: December 4, 2001

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE ERIC BALL,

Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

This case arises out of a police search of a motor vehicle, a Ford Tempo, in Albion, Michigan on July 29, 1995. Petitioner Eric Ball had been a passenger in the vehicle, but no one was in the car when police approached. Cocaine was found behind the glove compartment of the car, not in plain view. The glove compartment had to be removed to see the cocaine. Petitioner was sentenced to life in prison for possession with intent to deliver over 650 grams of cocaine pursuant to M.C.L. 333.7401. The questions presented are:

QUESTION 1: WHETHER, UNDER *STONE V. POWELL*, PETITIONER MAY HAVE FEDERAL COURT REVIEW OF A FOURTH AMENDMENT QUESTION WHERE THE STATE COURT USED A STANDARD DIRECTLY CONTRARY TO THAT USED BY THE UNITED STATES SUPREME COURT.

QUESTION 2: WHETHER, UNDER *STONE V. POWELL*, PETITIONER MAY HAVE FEDERAL COURT REVIEW OF A DISTINCT FOURTH AMENDMENT QUESTION WHERE THE STATE COURT FAILED TO ADDRESS OR ANSWER THE QUESTION AT ALL.

QUESTION 3: WHETHER IT WAS CONSTITUTIONAL TO SEIZE PETITIONER BALL MERELY BECAUSE THE

DRIVER OF A CAR IN WHICH HE WAS A PASSENGER HAD NO DRIVER'S LICENSE, BUT PETITIONER DID HAVE A LICENSE.

QUESTION 4: WHETHER IT WAS CONSTITUTIONAL TO SEIZE AND INVENTORY SEARCH AN AUTOMOBILE THAT WAS PARKED IN A PRIVATE DRIVEWAY, WHERE PETITIONER AND THE DRIVER EXITED THE CAR BEFORE POLICE APPROACHED.

QUESTION 5: WHETHER IMPROPER PROSECUTOR ARGUMENT DENIED PETITIONER A FAIR TRIAL.

QUESTION 6: WHETHER THE FACT THAT THE DISTRICT COURT RULED AGAINST PETITIONER IS A VALID GROUND TO DENY A CERTIFICATE OF APPEALABILITY.

QUESTION 7: WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT, WHERE THE DRUGS WERE HIDDEN, NOT IN THE GLOVE COMPARTMENT, BUT BEHIND IT, AND COULD NOT BE SEEN WITHOUT FULLY REMOVING THE GLOVE COMPARTMENT, AND PETITIONER WAS A PASSENGER IN THE VEHICLE.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE ERIC BALL,

Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

ERIC BALL, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Habeas Corpus to review his conviction and sentence from the Circuit Court for Calhoun County, Michigan, entered March 8, 1996.

OPINIONS BELOW

The following rulings or orders are attached: (1) Order of the 6th Circuit Court of Appeals of June 15, 2001 denying Certificate of Appealability; (2) Order of the Sixth Circuit of September 10, 2001, denying Rehearing;

(3) Order of the United States District Court of March 9, 2001, denying Certificate of Appealability; (4) Opinion and Order of the United States District Court of December 15, 2000, denying Habeas Corpus; (5) Opinion and Order of the United States District Court of February 11, 2000, denying the Respondent's Motion to Dismiss; (6) State Circuit Court order of November 11, 1997, denying Motion for Relief from Judgment; (7) State Court of Appeals Opinion of October 7, 1997, affirming conviction.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Calhoun County, Michigan, Circuit Court. The original judgment was entered March 8, 1996. The Petition for Habeas Corpus was denied in United States District Court on December 15, 2000. The District Court denied Certificate of Appealability on March 9, 2001. The Sixth Circuit Court of Appeals denied Certificate of Appealability on June 15, 2001, and denied reconsideration on September 9, 2001.

This Court has jurisdiction over this original Petition for Habeas Corpus pursuant to 28 U.S.C. 2241 and the rule announced in *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Eric Ball was charged with possession with intent to deliver over 650 grams of cocaine, contrary

to M.C.L. 333.7401. Jury trial was held in the Calhoun County, Michigan, Circuit Court before Judge James R, Kingsley. A Motion to Suppress based on illegal search was denied. (T Jan 8 1996, 5-8). On March 8, 1996, Judge Kingsley sentenced Petitioner to prison for life. Subsequent appeals to higher state courts were unsuccessful.

A Petition for Habeas Corpus was filed in the United States District Court. Judge Patrick Duggan denied the Respondent's Motion to Dismiss. Judge Marianne Battani denied the Petition for Habeas Corpus on December 15, 2000. Judge Battani denied Certificate of Appealability on March 9, 2001. The Sixth Circuit Court of Appeals denied Certificate of Appealability on June 15, 2001. The Sixth Circuit Court of Appeals denied rehearing on September 10, 2001.

Statement of Facts

Thomas Calhoun testified that he was testifying under an agreement to get a lesser charge of possession with intent to deliver 50 to 225 grams of cocaine and sentence of 5 to 20 years. (T I, 129-130). He would have received more if he had not made a deal with the prosecutor. (T I, 172). He had ridden with Eric Ball to Albion, Michigan before. (T I, 131). On July 28, 1995, around 11 p.m. he left Ypsilanti with Petitioner Ball. (T I, 133-134). They parked in front of a motorcycle club.

Calhoun spoke to a relative. (T I, 137). Calhoun had lots of friends and relatives in Albion. (T I, 152).

Calhoun testified that Petitioner Ball suggested that they leave. Shortly thereafter, they were stopped by police. Calhoun gave the police the false name Tommy Haywood. Calhoun testified that he never saw the cocaine that police took out of the car. (T I 138-140). Calhoun had $1200.00 on him at the time of the arrest. (T I, 154).

On no occasion with Petitioner Ball did Calhoun ever see any drugs. (T I, 159).

Off. Larry Weeks testified that on July 29, 1995, he observed a maroon Ford Tempo near the Flint Eagles Motorcycle Club. His information was that the registration plate was improper so he followed the vehicle. The car pulled into a driveway at 714 North Albion. The driver, Mr. Calhoun, got out as did the passenger, Petitioner Ball. He met them halfway between their car and his. (T I, 191-194). Calhoun said he was Tommy Haywood, and Petitioner Ball said he was Ricardo Bally. (T I 195-196). Petitioner showed him the paperwork for the rented vehicle. (T I, 196).

The car rental agreement showed the same license plate as on the car itself. He was satisfied that the license plate was legitimate. (T I, 217-218).

Calhoun had no drivers license and was arrested for that. He had $1289.00 on him. (T I, 199-200).

Defendant consented to have the officer search him. Defendant had $131.50.

Off. Weeks then searched the car. (T I, 204). He then called for a canine officer, Off. Etter. (T I, 206). Etter called to his attention bags behind the glove compartment. (T I, 207).

Off. Tim Stanley testified that Defendant was detained and not free to leave. It was not until after the drugs were found that Defendant was placed under arrest. (T I, 2321-232).

Off. Kurt Etter testified that he came with the dog Brando and did an exterior then interior scan of the car with the dog. (T I, 239-240). Because of positive indications from the dog he began to personally search. (T I, 241). In order to find the drugs, he had to remove the glove box. (T I, 242).

Greg Michaud of the police crime lab testified that there were no prints of Calhoun or Petitioner Ball on the bags of drugs. (T II, 86). Jeffrey Rosenthal of the lab testified that the bags held 883 grams, including cocaine. (T II, 100, 103).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER, UNDER *STONE V. POWELL*, PETITIONER MAY HAVE FEDERAL COURT REVIEW OF A FOURTH AMENDMENT QUESTION WHERE THE

STATE COURT USED A STANDARD DIRECTLY CONTRARY TO THAT USED BY THE UNITED STATES SUPREME COURT.

QUESTION 2: WHETHER, UNDER *STONE V. POWELL*, PETITIONER MAY HAVE FEDERAL COURT REVIEW OF A DISTINCT FOURTH AMENDMENT QUESTION WHERE THE STATE COURT FAILED TO ADDRESS OR ANSWER THE QUESTION AT ALL.

This case involves questions of the applicability of the ruling of *Stone v. Powell*, 428 U.S. 465 (1976), which limits or eliminates federal court Habeas Corpus review of state court rulings on Fourth Amendment issues. The specific language in *Stone v. Powell* that is at issue is:

> "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."

Many federal courts have taken this language to mean that no Fourth Amendment claim can ever be raised in Habeas Corpus under 28 U.S.C. § 2254. The unfortunate fact is that many state court judges, knowing

they are freed from federal oversight on Fourth Amendment questions, feel free to disregard United States Supreme Court and other federal court authority on the subject of illegal search or seizure. The result has been a reign of lawlessness in many state courts.

Petitioner submits that if *Stone v. Powell* is to remain in place, at a minimum, the exceptions stated in *Stone v. Powell* should be followed where applicable. The growing judicial trend to view *Stone v. Powell* as an absolute bar to all search and seizure claims, instead of viewing it as a more complex rule that bars some claims but not others, defeats the United States Supreme Court authority that adopted the rule in the first place, as well as leading to inconsistent and unfair results.

A proper interpretation of the rule is found in *Weber v. Murphy*, 15 F.3d 691 (7th Cir. 1993):

> "A state court evidentiary hearing may be less than full and fair if it yields factual determinations not fairly supported by the record as a whole."

Similarly, in *Gamble v. State of Oklahoma*, 583 F.2d 1161 (10th Cir. 1978), the Court held:

> "Thus a federal court is not precluded from considering a Fourth Amendment claim in habeas corpus proceedings where the state court willfully refuses to apply the correct and

> controlling constitutional standards. Deference to state court consideration of Fourth Amendment claims does not require federal blindness to a state court's willful refusal to apply the appropriate constitutional standard."

This case involves two questions relating to the *Stone v. Powell* rule: whether there can be review of rulings where the wrong constitutional standard is used, and whether there can be review of legal issues that were presented to the state courts but never ruled upon by them.

Because "*Stone's* limitation on federal habeas relief was not jurisdictional in nature," *Withrow v. Williams*, 507 U.S. 680, 686; 113 S.Ct. 1745; 123 L.Ed.2d 407 (1993), it is not unconstitutional to grant review to a Habeas Corpus Petitioner with a Fourth Amendment claim.

Review of these questions are essential to determine the applicability of *Stone v. Powell*, whether it is a complete bar to relief in all cases, or whether the exceptions established in *Stone v. Powell* itself should be honored.

QUESTION 3: WHETHER IT WAS CONSTITUTIONAL TO SEIZE PETITIONER BALL MERELY BECAUSE THE DRIVER OF A CAR IN WHICH HE WAS A PASSENGER HAD NO DRIVER'S LICENSE, BUT PETITIONER DID HAVE A LICENSE.

QUESTION 4: WHETHER IT WAS CONSTITUTIONAL TO SEIZE AND INVENTORY SEARCH AN AUTOMOBILE THAT WAS PARKED IN A PRIVATE DRIVEWAY, WHERE PETITIONER AND THE DRIVER EXITED THE CAR BEFORE POLICE APPROACHED.

The officer received information that the license plate belonged to a different Hertz rental car, causing him to follow the car. The car stopped in the driveway of a home, and the two people inside got out and walked toward the police car.

Before any search of the vehicle, the officer determined that the rental agency had inadvertently put the wrong plate on the wrong car. There was no knowing violation of any law by the action of riding in a rental car. The officer discovered that the driver, Tommy Calhoun, did not have a driver's license, which justified the police in arresting him. However, clearly established law provides that the police were not justified in detaining the passenger (Petitioner Ball) or in searching the vehicle.

The first search of the vehicle found nothing, and drugs were ultimately found only after a dog search. The drugs were seen by the officer after he removed the glove compartment from the dashboard, hidden behind the glove compartment.

The state court found two reasons for permitting the detention of Petitioner Ball and the search of the car: inventory search, and search incident to arrest of the driver for no operator's permit. (A32-A34). Neither of those rationales address in any way the detention of Mr. Ball before the first search or before the second search. Because the state court did not address it, *Stone v. Powell* should not preclude Habeas Corpus consideration, because of no state court ruling to defer to. Yet, here it did preclude Habeas Corpus consideration.

Officer Larry Weeks testified that as he approached the vehicle, which was parked in a driveway, both people that were in the car exited the car, and met the officer some distance from the car. (Suppression Hearing I, 7-9). Under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the officer could legitimately search only things within reach of the arrestee. Under *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the police may search the passenger area upon arresting the "occupant" of the vehicle. However, where the driver exited the vehicle before being ordered to do so, and did not return to the vehicle, the person being arrested is not the "occupant" of the vehicle, and the law provides that a search incident to arrest cannot include the vehicle. *United States v. Hudgins*, 52 F.3d 115 (6th Cir. 1995):

> "where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within *Belton's* bright-line rule."

In accord, see *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), holding that where the person soon to be arrested got out of his car before being spoken to by police, the search incident to arrest could not properly include the car.

The state court ruled that it is lawful to search a car upon arrest of the occupant, without addressing or considering in any way the claim and case law holding that a driver like Mr. Calhoun, having left the car before being ordered to do so, was not an "occupant" of the car. The state court did not apply or attempt to apply the correct and controlling constitutional standards. As the Court held in *Gamble*, supra:

> "a federal court is not precluded from considering a Fourth Amendment claim in habeas corpus proceedings where the state court willfully refuses to apply the correct and controlling constitutional standards."

As the Court held in *New York v. Class*, 475 U.S. 106; 106 S.Ct. 960; 89 L.Ed.2d 81 (1986): "A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."

We submit, therefore, that the question of whether the federal court had jurisdiction to decide the Fourth Amendment claims is one on which reasonable jurists could differ. A Certificate of Appealability should have been granted.

The state court also found that because the driver had been arrested, it was proper to seize the car and conduct an inventory search. We submit that in this also the state court did not apply or attempt to apply the correct and controlling constitutional standards. Under *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), police must have valid cause to seize the car before an inventory search is proper. "The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." But where the car is not impeding traffic or threatening public safety, the officer cannot seize it or inventory it. The Michigan Court of Appeals acted unreasonably in stating "In the present case, there was no question that the car was lawfully detained for impounding after the driver had been arrested." Mr. Calhoun was a pedestrian when arrested, and even if he had still been in the car a seizure of the car would be unreasonable and unlawful under the Fourth Amendment as explained in *Opperman*.

The car was parked in a driveway, and therefore was not a traffic danger. There was no authority under

state or federal law to seize the car. *People v. Siegel*, 95 Mich. App. 594 (1980):

> "We find that there was no valid reason to impound the locked automobile which was legally parked on a private driveway. ... The automobile was locked and properly parked in a driveway so there was no public safety reason to impound it. The defendant's friend, Eiko, had not been arrested at that time and could presumably arrange to take care of the vehicle if the defendant did not wish to leave it in the driveway. In fact, the police never asked the defendant whether he wanted to make any arrangements for the automobile. We conclude that this "inventory search" was a mere pretext for an investigation rather than a normal police procedure, so we cannot uphold it under *Opperman*, supra.

Because the state court did not "apply or attempt to apply the correct and controlling constitutional standards," the state court proceedings were inadequate to vindicate Petitioner's federal rights, and Habeas Corpus review is not barred.

Review should be granted to visit the questions of whether the mere fact that it is a Fourth Amendment question bars all federal court review, as the District Court and Sixth Circuit seem to think, or whether the rule of *Stone v. Powell* is a rule with exceptions as stated in the *Stone v. Powell* opinion itself.

Review should be granted to determine the right to detain and search someone who was formerly a passenger in a car, and to determine whether the police can seize and "inventory search" a vehicle where there was no just cause for the seizure of the vehicle under state law and under the rules of *South Dakota v. Opperman*.

QUESTION 5: WHETHER IMPROPER PROSECUTOR ARGUMENT DENIED PETITIONER A FAIR TRIAL.

QUESTION 6: WHETHER THE FACT THAT THE DISTRICT COURT RULED AGAINST PETITIONER IS A VALID GROUND TO DENY A CERTIFICATE OF APPEALABILITY.

In summary, the prosecutor in closing argued facts not in evidence, misstated testimony, shifted the burden of proof to Petitioner, and vouched for the credibility of prosecution witnesses. It was highly prejudicial for the prosecutor to argue without evidence that Defendant had a history of bringing cocaine to Calhoun County to sell, where the only testimony was that Defendant had visited Calhoun County in the past, and there were no drugs testified to by any witness on any of the past trips. This denied due process of law. US Const., Amend. XIV.

The District Court denied a Certificate of Appealability because "This Court held that the Michigan

Court of Appeals decision that the prosecutor's conduct did not render Petitioner's trial fundamentally unfair was a reasonable application of Supreme Court precedent." (A5). Of course it is true that the District Court ruled against Petitioner. No Petitioner would ever try to appeal if the District Court had not ruled against him. By stating that the mere fact of decision against Petitioner means there cannot be a Certificate of Appealability, the District Judge created a rule that would insulate all Habeas Corpus rulings from judicial review. The Sixth Circuit, in denying a Certificate of Appealability, effectively adopted the nonsensical rule that a ruling against the Petitioner bars appellate review.

No Petitioner would ever seek review of a ruling in his favor. The only rulings he would seek review of are those that go against him. If a Petitioner cannot get review of rulings in his favor, and also cannot get review of rulings against him, the scope of appellate review in Habeas Corpus cases would be unreasonably limited.

Under the authority that the courts should have followed, to get a Certificate of Appealability, "Obviously, the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090, 1104 (1983). The District and Circuit Courts therefore used the incorrect standard.

The District Court found the state court ruling to be reasonable, but did not explain that conclusion. Here,

there was no strong evidence that Petitioner would necessarily know or possess cocaine in the glove compartment of the car driven by Mr. Calhoun. The District Court violated the standard of *Martin v. Parker*, 11 F.3d 613 (6th Cir. 1993) that "Where, as here, the evidence of guilt is at best conflicting, egregious prosecutorial misconduct of this kind rises to the level of a constitutional deprivation, denying the defendant a fundamentally fair trial."

The state court ruling was not reasonable in light of controlling federal law.

QUESTION 7: WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT, WHERE THE DRUGS WERE HIDDEN, NOT IN THE GLOVE COMPARTMENT, BUT BEHIND IT, AND COULD NOT BE SEEN WITHOUT FULLY REMOVING THE GLOVE COMPARTMENT, AND PETITIONER WAS A PASSENGER IN THE VEHICLE.

Due process requires that no criminal conviction be sustained unless each fact the prosecutor is required to prove for conviction is supported by proof beyond a reasonable doubt. U.S. Const., Amend. XIV; *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979).

The District Court denied a Certificate of Appealability because "This Court held that the state court's finding was a reasonable application of Supreme

Court precedent." (A5). Once again, it is true that the District Court ruled against Petitioner. No Petitioner would ever try to appeal if the District Court had not ruled against him. By stating that the mere fact of decision against Petitioner means there cannot be a Certificate of Appealability, the District Judge created a rule that would insulate all Habeas Corpus rulings from judicial review (when sought by a Petitioner). The Sixth Circuit, in denying a Certificate of Appealability, effectively adopted the nonsensical rule that the fact of a ruling against the Petitioner itself bars appellate review.

Although Petitioner was a passenger in the car, and was seated in front of the glove compartment, there is no testimony or reason to believe that Petitioner opened the glove box. Certainly, there is no testimony or reason to believe that Petitioner removed the glove box to search was may have been hidden behind it. There were no fingerprints of Petitioner on any of the items. (T II, 90-91). Petitioner was never seen with any drugs. (T I, 159). There was no evidence of drug use or drug paraphernalia inside the car. (T I, 216).

It was therefore unreasonable to find sufficient evidence that Petitioner knew of, possessed and controlled the drugs hidden behind the glove box. See *United States v. White*, 932 F.2d 588, 589 (6th Cir. 1991):

> "To establish constructive possession, the evidence must indicate 'ownership, dominion

> or control over the contraband itself or the premises or vehicle in which the contraband is concealed.' ... Physical proximity to drugs, or mere presence in an area where drugs are found, is not sufficient."

See also *United States v. Beverly*, 750 F.2d 34 (6th Cir. 1984); *United States v. Valerio*, 48 F.3d 58, 64 (1st Cir. 1995) [finding of possession requires evidence of knowledge by the defendant that the contraband was present]; *United States v. Chairez*, 33 F.3d 823 (7th Cir. 1994) [presence in a car with a gun is not proof of possession, and that there must be proof of knowledge, as well as of dominion and control]; *United States v. Brown*, 3 F.3d 673 (3rd Cir. 1993); *United States v. Rodriguez*, 761 F.2d 1339, 1341 (9th Cir., 1985) [where more than one person access to where drugs are hidden, it cannot be speculated that a particular person was the possessor]; *United States v. Earl*, 27 F.3d 423, 424-425 (9th Cir. 1994) [mere proximity to drugs, even with knowledge of their presence, not sufficient evidence of possession].

To find that there is nothing here that reasonable jurists could disagree on was itself unreasonable.

While there is testimony that Petitioner Eric Ball, when first questioned by police, gave the name of Ricardo Bally, later determined to be false, that circumstance at best gave a reason to investigate. It did not prove him guilty of any crime in particular, including knowledge of the drugs hidden outside of plain view.

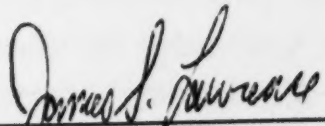
[We argue above that Mr. Ball should not have been detained and ordered to identify himself in the first place, but that claim is not essential to the insufficient evidence claim.]

Review should be granted to determine the question of the standards to be used in cases of insufficient evidence, as well as the standards for denying Certificate of Appealability.

CONCLUSION

Petitioner Eric Ball respectfully submits that for the reasons stated above, this Court should grant plenary consideration, and upon consideration grant a Writ of Habeas Corpus.

Respectfully submitted,



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Dated: December 4, 2001

No. 01-1129

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC CLYDE BALL,

Petitioner-Appellant,

v.

DAVID SMITH, Warden,

Respondent-Appellee.

FILED
JUNE 15, 2001

LEONARD GREEN, Clerk

ORDER

Before: MARTIN, Chief Judge.

Eric Clyde Ball appeals a district court order dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Ball now moves this court for a certificate of appealability under Fed. R. App. P. 22(b). Upon review, the court denies Ball's motion.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

A 2 Ruling of US District Court, March 9, 2001

No. 01-1129

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC CLYDE BALL,

Petitioner-Appellant,

v.

DAVID SMITH, Warden,

Respondent-Appellee.

FILED
SEP 10, 2001
LEONARD GREEN, Clerk

ORDER

Before: KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

Eric Clyde Ball has petitioned the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to a panel of three judges on which the original deciding judge does not sit, as well as the other active judges of the court. No judge having requested a vote on the suggestion for en bane rehearing, the petition was referred to the three-judge panel for a determination on the merits of the petition for rehearing.

The panel has further reviewed the petition for rehearing and concludes that the application for a certificate of appealability was properly denied. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC CLYDE BALL,
Petitioner,

Case Number: 98-60523
HONORABLE
MARIANNE O. BATTANI

v.

DAVID SMITH,
Respondent.

OPINION AND ORDER DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY

I. Introduction

Petitioner Eric Clyde Ball, a state inmate currently incarcerated at the Ryan Correctional Facility in Detroit, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 15, 2000, this Court issued an opinion and order denying the petition for a writ of habeas corpus. Now before the Court is Petitioner's request for a certificate of appealability.

II. Analysis

Before Petitioner may appeal the Court's dispositive decision denying his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(l)(A); Fed. R. App. P. 22(b). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed.

R. App. P. 22(b); In re Certificates of Appealability, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1604 (2000).

Petitioner was convicted in Calhoun County Circuit Court of possession with intent to deliver over *650* grams of cocaine. He was sentenced to life imprisonment. In his habeas corpus petition, Petitioner presented the following claims for relief:

I. Petitioner was denied his right not to be subjected to unreasonable searches and seizures guaranteed by both the United States and Michigan Constitutions, U.S. Const., Am. IV; Const. 1963, Art. 1, § 11.

II. Petitioner was denied his state and constitutional right to a fair trial due to the cumulative prejudicial effect of prosecutorial misconduct.

III. Petitioner was denied his right to due process of the law guaranteed by the 14th Amendment to the United States Constitution and Article 1 § 17, Michigan Constitution 1963, when the evidence was insufficient to find

guilt beyond a reasonable doubt for a conviction.

This Court held that none of these claims warranted habeas corpus relief. First, the Court held that Petitioner's Fourth Amendment claim was fully and fairly litigated in the Michigan trial and appellate courts. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial." Stone v. Powell, 428 U.S. 465, 494-95 (1976). Thus, Petitioner's Fourth Amendment claim did not warrant habeas corpus relief.

Second, Petitioner claimed that he was entitled to habeas corpus relief because the prosecutor engaged in misconduct during his closing argument. This Court held that the Michigan Court of Appeals decision that the prosecutor's conduct did not render Petitioner's trial fundamentally unfair was a reasonable application of Supreme Court precedent.

Finally, Petitioner claimed that a writ of habeas corpus should issue because insufficient evidence was presented to support his conviction. The Michigan Court of Appeals held that sufficient evidence was presented to satisfy each element of the crime. Petitioner presented no evidence to contradict the findings of fact reached by the state court. This Court held that the state court's finding was a reasonable application of Supreme Court precedent.

Petitioner has failed to establish that reasonable jurists would find this Court's assessment of Petitioner's foregoing habeas corpus claims was debatable or wrong. Therefore, he is not entitled to a certificate of

appealability with respect to any of his claims.

III. Conclusion

For the foregoing reasons, **IT IS ORDERED** that Petitioner's request for a certificate of appealability is DENIED.

MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC CLYDE BALL,
Petitioner,

Case Number: 98-60523
HONORABLE
MARIANNE O. BATTANI

v.

DAVID SMITH,
Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction.

Petitioner Eric Clyde Ball, a state inmate currently incarcerated at the Ryan Correctional Facility in Detroit, Michigan, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the Court denies the petition.

II. Facts

Petitioner's conviction arises out of a traffic stop that occurred at approximately 3:00 a.m. on July 29, 1995 in Albion, Michigan. Petitioner was a passenger in a Ford Tempo being driven by Tommy Calhoun. Police Officer Larry Weeks observed the Ford Tempo stopped outside a motorcycle club surrounded by a number of people. The

motorcycle club was frequently the site of drug activity. Officer Weeks ran a license plate check on the Ford Tempo. Dispatch reported to him that the license plate was registered to a Ford Aerostar owned by Hertz car rental company. After receiving this report, Officer Weeks located the Tempo a few blocks from the motorcycle club and stopped the vehicle.

The driver of the car and Petitioner exited the car after it was stopped. The driver told Officer Weeks that his name was Tommy Haywood and that he was not carrying his driver's license. Officer Weeks arrested the driver, whose name was later determined to be Tommy Calhoun, for driving without a license and for driving a vehicle without proper registration. Officer Weeks searched Calhoun subsequent to the arrest and found two pagers and $1,200 in cash.

Petitioner gave Officer Weeks a driver's license bearing the name Ricardo Bally. Petitioner consented to a search of his person. The search yielded a personal pager, a cellular phone, and some cash. Petitioner told the officer that he had borrowed the car from his girlfriend. Officer Weeks told Petitioner that the car would be impounded because it did not have proper registration. A canine unit responded to the scene. Officer Weeks testified that, pursuant to customary police procedure when a car is going to be impounded, he and the canine unit conducted a search of the car. They discovered rock cocaine in the glove compartment. The police crime laboratory later measured the cocaine found in the car to weigh over 650 grams.

III. Procedural History

Following a jury trial in Calhoun County Circuit Court, Petitioner was convicted of possession with intent to deliver over 650 grams of cocaine. On March 8, 1996,

he was sentenced to life imprisonment without parole.

Petitioner filed an appeal of right in the Michigan Court of Appeals, presenting the following claims:

I. Defendant-appellant's conviction should be reversed because the trial court erred in denying the motion to suppress the search.

II. Defendant-appellant's conviction should be reversed because the trial court abused its discretion in denying the motion for mistrial due to the cumulative prejudicial effect of the prosecutor's closing arguments.

III. Defendant-appellant's conviction should be reversed because there was insufficient evidence to find for the conviction.

The Michigan Court of Appeals affirmed Petitioner's conviction. People v. Ball, No. 193881 (Mich. Ct. App. Oct. 7, 1997).

Petitioner attempted to file a late application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court, however, rejected the application for leave to appeal because it was filed beyond the 56-day period permitted under Michigan court rules. *See* Affidavit of Corbin R. Davis, filed by Respondent in this matter on September 6, 2000, as part of the Rule 5 materials.

On December 23, 1998, Petitioner filed the pending habeas corpus petition, presenting the following

claims for relief:

I. Petitioner was denied his right not to be subjected to unreasonable searches and seizures guaranteed by both the United States and Michigan Constitutions, U.S. Const., Am. IV; Const. 1963, Art. 1, § 11.

II. Petitioner was denied his state and constitutional right to a fair trial due to the cumulative prejudicial effect of prosecutorial misconduct.

III. Petitioner was denied his right to due process of the law guaranteed by the 14th Amendment to the United States Constitution and Article 1 § 17, Michigan Constitution 1963, when the evidence was insufficient to find guilt beyond a reasonable doubt for a conviction.

IV. Analysis

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner's application was filed after April 24, 1996, the

provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume

the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)[1]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases....
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 15 19-20 (2000).

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision

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[1] In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.
>
> [A]n unreasonable application of federal law is different from an 28 U.S.C. § 2254(e)(l) provides, in pertinent part:
>
> incorrect application of federal law.... Under § 2254(d)(1)'s unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, the Court proceeds to the merits of the petition for a writ of habeas corpus.

B. Unreasonable Search and Seizure Claim

Petitioner claims that he is entitled to habeas corpus relief because the warrantless search of the car and the bag contained in the car was unsupported by

probable cause and the trial court erred in denying his motion to suppress. The Supreme Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." Stone v. Powell, 428 U.S. 465, 494-95 (1976).

In the instant case, Petitioner's Fourth Amendment claim was the subject of an evidentiary hearing in the trial court where the facts of his claim were fully developed. Following the hearing, the trial court, applying the appropriate Fourth Amendment standard, held that the search was a valid search incident to the arrest of the driver. Petitioner then had an opportunity to present his Fourth Amendment claim to the Michigan Court of Appeals and Michigan Supreme Court. Thus, Petitioner's Fourth Amendment claim was fully and fairly litigated in the Michigan trial and appellate courts and, consequently, is not cognizable on habeas review.

C. Alleged Prosecutorial Misconduct

Petitioner claims that he is entitled to habeas corpus relief because the prosecutor engaged in prosecutorial misconduct during his closing argument. Specifically, Petitioner claims that the prosecutor: (1) argued facts not in evidence; (2) misstated the testimony; (3) shifted the burden of proof to the Petitioner; (4) vouched for the credibility of a key witness; and *(5)* ridiculed the defense.

"Prosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process

deprivation." Caldwell v. Russell, 181 F.3d 731, 736 (6th Cir. 1999). The determination whether the trial was fundamentally unfair is "made by evaluating the totality of the circumstances." Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982). The court must examine "'the fairness of the trial, not the culpability of the prosecutor.'" Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), *(quoting* Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993)).

The last state court to issue a reasoned opinion addressing Petitioner's claims of prosecutorial misconduct, the Michigan Court of Appeals, stated, in pertinent part:

> Next, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. We disagree with defendant's position.
>
> Defendant first contends that in his closing arguments the prosecutor misstated the testimony regarding the amount of cocaine seized and its total value. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.. . . Misconduct must be determined on a case-by-case basis, reviewing the prosecutor's comments in context.... Upon review of the testimony, we find that the prosecutor did misstate the witness' testimony regarding the average price for rock cocaine. However, we conclude that the error was harmless in light of the court's cautionary instruction-

to the jury and the prosecutor's reminder to the jurors that it was their job to determine the facts and remember the testimony. Similarly, we find no merit in defendant's argument that the prosecutor misstated the testimony regarding whether defendant voluntarily offered false identification. The record supports the prosecutor's statement, and the court correctly instructed the jury that lawyers do not testify and that the jury is responsible for recalling the correct testimony.

Defendant also moved for a mistrial based on statements by the prosecutor during closing arguments, which defendant argues vouched for the credibility of a witness and resulted in shifting the burden of proof from the prosecution to defendant. .

...[A] prosecutor may not vouch for the credibility of a witness to the effect that the prosecutor has some special knowledge concerning a witness' truthfulness. . . . However, it is not improper to argue that a witness should be believed... . Viewing the prosecutor's comments in context, we agree with the trial court's finding that the prosecutor was not vouching for the credibility of the witness but rather was stating to the jurors that they must determine whether to believe the witness. Further, the court

instructed the jury on the prosecutor's burden of proof and the prosecutor reiterated that the jury must determine the credibility of witnesses. We find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on prosecutorial vouching for a witness.

Similarly, defendant's argument that the prosecutor shifted the burden of proof to defendant lacks merit. The prosecutor employed a method of asking hypothetical questions to the jury to highlight the deficiencies in defendant's theory. We do not believe that the prosecutor's technique rose to a level requiring reversal. The jury was not left with the impression that defendant must respond to the hypothetical questions. . . . Again, viewing the prosecutor's comments in context, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on improper burden-shifting.

Defendant asserts several other instances of prosecutorial misconduct for which he provides no argument and cites no authority regarding why the trial court's rulings were incorrect. Because defendant failed to sufficiently argue these claims, he has effectively abandoned them on appeal. -

People v. Ball, slip op. at 2-3.

Considering the totality of the circumstances, the Michigan Court of Appeals concluded that prosecutor's conduct did not render Petitioner's trial fundamentally unfair. The Michigan Court of Appeals decision was not an unreasonable application of Supreme Court precedent. Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

D. Sufficiency of the Evidence

Finally, Petitioner claims that he is entitled to habeas corpus relief because insufficient evidence was presented to support a finding that he possessed over 650 grams of cocaine with the intent to sell.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court established that the standard of review for a sufficiency of the evidence challenge must focus on whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original). Pursuant to 28 U.S.C. § 2254(d)(1), this Court must determine whether the state court's application of the Jackson standard was contrary to or an unreasonable application of Supreme Court precedent. In making this determination, this Court must afford the state court's findings of fact a presumption of correctness unless it is established by clear and convincing evidence that the factual determination in the state court was erroneous. 28 U.S.C. §2254(e)(1); West v. Seabold, 73 F.3d 81, 83 (6th Cir. 1996), *cert. denied*, 116 S. Ct. 2569 (1996).

In its opinion, the Michigan Court of Appeals did not identify Jackson as the standard by which it determined that there was sufficient evidence to support the trial court's verdict of first degree murder. However, based upon the language of the opinion, it is clear that the court applied the Jackson standard:

> Finally, defendant argues that the evidence presented was insufficient to support his conviction of possession with intent to deliver over *650* grams of cocaine. Defendant argues that the evidence was insufficient to prove possession or intent. We disagree. Conviction requires proof that defendant knowingly possessed the cocaine and had the intent to deliver it to someone else. ...
>
> In reviewing a claim of insufficiency of the evidence, this Court
> must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to prove the essential elements of the crime beyond a reasonable doubt.... This standard inherently precludes this Court from interfering with the factfinder's task of weighing the evidence or making determinations as to witnesses' credibility
>
> First, the element of possession may be satisfied by actual, physical possession of the controlled substance or by constructive possession.... Constructive possession can be shown by knowledge of the presence of

the cocaine coupled with the right to exercise control over it. .. .While a person's mere presence at a location where drugs are found is not enough by itself to establish constructive possession, many factors may be considered to find a sufficient nexus between the defendant and the drugs. -Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband....

We find that there was sufficient evidence in the present case to find that defendant at least constructively possessed the cocaine. The cocaine was found in the glove compartment directly in front of where defendant had been sitting. A police officer testified that defendant told him that the car was borrowed from defendant's girlfriend, indicating the likelihood that defendant had some control over the car and its contents. Further, the driver of the car

testified that defendant had stated that he had "dope" in the glove compartment. The driver also testified that defendant was involved with drug dealing on several similar trips. Viewing all of the evidence presented in the light most favorable to the prosecution, the evidence was sufficient for the jury's finding that defendant at least constructively

possessed the cocaine.

> There was also sufficient evidence to prove an intent to deliver. As with possession, actual delivery is not required to prove intent to deliver. - . . . Surrounding circumstances such as the quantity of drugs recovered and the way in which the drugs are packaged can demonstrate an intent to deliver. . . . - In the present case, evidence was presented regarding the average size and cost of one rock of cocaine and the total amount of cocaine discovered. There was also evidence of several pagers and cellular phones in the car. Upon a careful review of the record, we conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to justify the jury's finding that defendant knowingly possessed the cocaine with the intent to deliver it.

People v. Ball, slip op. at 3-4.

This Court concludes that the Michigan Court of Appeals' decision did not "result[] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Thus, Petitioner is not entitled to federal habeas corpus relief with respect to this claim.

V. Conclusion

For the foregoing reasons, IT IS ORDERED that

Petitioner's application for a writ of habeas corpus is DENIED and that matter is DISMISSED WITH PREJUDICE.

MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIC CLYDE BALL,
Petitioner,

CASE NO: 98-CV-75476-DT
HON. PATRICK J. DUGGAN

V.

DAVID SMITH,
Respondent

_____/

OPINION

Petitioner, Eric Clyde Ball ("petitioner"), currently incarcerated at the Ryan Correctional Facility in Detroit, Michigan, has a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed December 23, 1998, pending before this Court. Also pending before the Court is respondent's motion to dismiss the petition for writ of habeas corpus. Respondent contends that the petition is subject to summary dismissal because petitioner procedurally defaulted his claims in the Michigan Supreme Court by failing to file his delayed application for leave to appeal in that court within fifty-six (56) days of the decision of the Michigan Court of Appeals. *See* M.C.R. 7.303(C)(3).

On February 9, 2000, petitioner also filed the following with this Court: (1) motion to amend petition, (2) "motion to reject respondent's opposition to dismiss petition," and (3) request to proceed *in forma pauperis*.

Discussion

It is undisputed that petitioner's delayed application for leave to appeal the decision of the Michigan Court of Appeals was received by the Michigan Supreme Court four days late and that petitioner's papers were returned to him by the Michigan Supreme Court for that reason. (*See* Dec. 11, 1997 Letter of Clerk Corbin R. Davis to Pet.). It is also undisputed that failure to comply with the Michigan Supreme Court's fifty-six-day rule, which resulted in the default of his claims in that court, is a state procedural default. *Coleman v. Thompson,* 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2557 n.1, 115 L. Ed. 2d 640 (1991); *Seeger v. Straub,* 29 F. Supp. 2d385, 391 (E.D. Mich. 1998). Whether petitioner has shown "cause" for his procedural default is disputed.

Cause

"Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate.., that there was 'cause' for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error." *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986) (citations omitted).

Petitioner alleges that unwarranted delay by prison officials in mailing his delayed application caused his procedural default in the Michigan Supreme Court.

Petitioner alleges that he delivered his delayed application for leave to appeal in the Michigan Supreme Court (hereinafter "delayed application") to prison administrative personnel in time for the papers to have reached the Michigan Supreme Court before the fifty-six-

day deadline expired. Petitioner further alleges that his delayed application was late (and therefore rejected) because prison personnel "failed to be expeditious in processing and mailing his pleadings" and "neglected to properly follow their own departmental mailing policies." (Pet. at 7). In support of his allegations, petitioner quotes (since revised) Policy Directive ("PD") 05.03.1185, which he states provided that: "Institutions shall endeavor to process all incoming mail and outcoming [sic] mail within [24] hour [sic] of receipt...." (Pet. at 7).[1]

Copies of several relevant documents have been supplied to the Court. A Michigan Department of Corrections Disbursement Authorization dated November 26, 1997, indicates that petitioner authorized disbursement of funds for "certified mail, 2 legal envelopes gold, 2 reg. envelopes white, Michigan Supreme Court." A copy of the Domestic Return Receipt for an article sent to the Michigan Supreme Court indicates that the article was sent by express mail on December 4, 1997, one week after November 26, 1997. A printout of petitioner's prison trust account transactions shows that petitioner was charged a total of $17.06 for "UPS/postage" on December 4, 1997. As previously noted, the letter of Corbin Davis cited above states that petitioner's papers were received by the Michigan

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[1] The current PD 05.03.118 UU, revised effective July 19, 1999, states in pertinent part that: "Facilities shall endeavor to process all incoming and outgoing mail within on [sic] day after receipt. Mail received by any form of express mail or special delivery is not required to be expedited. Mail sent or received over holidays or weekends, and mail requiring special handling, may require additional time in processing."

Supreme Court on December 5, 1997.

Petitioner also maintains that his default was also caused by the Michigan Court of Appeals's decision in *Walker-Bey v. Department of Corrections*, 222 Mich. App. 605 (1997), which, in a case involving a *pro se* prisoner's attempt to appeal a prison disciplinary ruling, the court declined to adopt the prison mailbox rule from *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). Petitioner further contends that he was prejudiced by the *Walker-Bey* decision because its ruling (in the context of tardy processing of his delayed application by prison officials) resulted in the refusal of the Michigan Supreme Court to file his papers.

Respondent contends that the Michigan Court of Appeals's decision not to adopt the prison mailbox rule cannot be cause for petitioner's procedural default, as the prison mailbox rule from *Houston v. Lack* is a federal procedural rule that the Michigan courts are not required to follow. Respondent has not denied or even addressed petitioner's averment that unwarranted delay by prison officials caused petitioner to be unable to comply with Michigan's fifty-six-day rule. Furthermore, the documents supplied to the Court support petitioner's allegations. Respondent contends, however, that "[because Petitioner has clearly failed to establish cause to excuse his failure to raise his claims before the Michigan Supreme Court, Respondent need not address the prejudice prong." (Br. in Supp. of Mot. to Dismiss at 3). This Court disagrees

Petitioner alleges that he submitted his papers to a prison official over a week before they were mailed. The Court has been supplied with copies of documents that support this allegation, and respondent has not denied it. In this Court's opinion, petitioner is asserting that an unwarranted, unnecessary delay in processing his

delayed application to the Michigan Supreme Court caused his procedural default because he delivered the papers to a prison official over a week before they were mailed and they were received only four days late.

A showing that interference by prison officials made compliance with a state procedural rule impracticable constitutes cause for a procedural default. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986); *Francis v. Rison,* 894 F.2d 353, 355 (9th Cir. 1990) ("a showing of interference by officials is one of the ways in which a habeas petitioner may be excused for a procedural default"). Because the Court has no evidence to refute petitioner's claim that he submitted his papers on November 26, 1997, but that they were not mailed until December 4, 1997,[2] this Court concludes that petitioner has established cause for his procedural default in the Michigan Supreme Court.

Potential Prejudice

In *Maztpin v. Smith,* the Sixth Circuit explained that "in analyzing a petitioner's contention of prejudice, the court should assume that the petitioner has stated a meritorious constitutional claim." *Maupin v. Smith,* 785 F.2d at 139.[3] This assumption, made solely for purposes of determining whether failure to review the claim in question prejudiced the petitioner, requires the reviewing

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[2] As previously indicated, respondent has not "denied" this allegation.

[3] The four step analysis from *Maupin* was recently re-affirmed by the Sixth Circuit in *White v. Schotten,* __ F.3d __, No. 97-4066, 2000 WL 61640, at *5 (6th Cir. Jan. 26, 2000).

court to assume without deciding that the petitioner's claims as alleged are valid. Then, if the petitioner has shown prejudice, the court should proceed to decide the merits of the claims, if the court has been supplied with the necessary materials for adjudication of the claims.

In the case before this Court, petitioner contends that his conviction and sentence are unconstitutional because: 1) inculpatory evidence was obtained through violation of his Fourth Amendment rights, 2) prosecutorial misconduct deprived him of a fair trial, and 3) his conviction is supported by insufficient evidence. (Pet. at 2).

This Court cannot, however, proceed to a determination of possible prejudice, or subsequently, the merits of these claims, because this Court has not been supplied with the necessary state court records, including the trial transcripts. Accordingly, the Court shall deny respondent's motion to dismiss and order respondent to file an answer addressing the merits of the petition. Motion to Amend and "Motion to Reject" reject respondent's opposition to dismiss petition." In essence, petitioner wishes to "respond" to the motion to dismiss. Petitioner believes he is entitled to file the aforementioned motions because "no 'Order Requiring [R]esponsive Pleading' was ever issued to Petitioner." (Mot. to Amend at ¶ 1). Thus, petitioner argues he did not know he was entitled to "respond" to respondent's motion to dismiss. However, what petitioner fails to realize is that the "Order Requiring Responsive Pleading" that is sent by the Court orders the respondent to file a responsive pleading, not petitioner.

Therefore, even though petitioner did not receive such Order, his motion, filed nearly eight months after respondent's motion to dismiss was filed, is untimely. Nevertheless, even if the Court were to allow petitioner to

file the "motion to reject," it is moot, as the Court has already granted the relief sought by petitioner in his "motion to reject." *See* Discussion, *supra*. Accordingly, petitioner's motion to amend and "motion to reject" shall be denied as moot.

Motion to Proceed *In Forma Pauveris*

On December 23, 1998, petitioner filed a petition for writ of habeas corpus with this Court. Court records show that the filing fee was paid for this petition. Therefore, petitioner's motion to proceed *informa pauperis* shall be denied as moot.

Conclusion

For the reasons set forth above, the Court shall deny respondent's motion to dismiss. Further, the Court shall deny as moot petitioner's motion to amend, "motion to reject respondent's opposition to dismiss petition," and motion to proceed *informa pauperis*.

FEB 11, 2000

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

A 30 Order of State Circuit Court, Nov. 11, 1997

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant, HON. JAMES C. KINGSLEY
Docket No. 95-2897-FC

v.

ERIC CLYDE BALL,
Defendant-Appellee.

/

J.B. JENKINS (P15481)
Assistant Prosecutor
161 E. Michigan Ave.
Battle Creek, MI 49014

ERIC CLYDE BALL, In Pro Per
Defendant-Appellee, MDOC #206560
17600 Ryan Rd.
Detroit, MI 48212

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, held in the Circuit Court Rooms, Court Room No. 480, in the Justice Center, in the City of Battle Creek, County of Calhoun, State of Michigan, on the 21 day of November, 1997.

PRESENT: HON. JAMES C. KINGSLEY, CIRCUIT JUDGE

Upon reading and filing the pleadings entered into this case, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJOURNED that Defendant's Motion for Relief from Judgment be and the same is hereby DENIED for the reason that Defendant could have raised his issues in his Michigan Court of Appeals brief, but failed to do so and, therefore, is precluded from review on this matter absent manifest injustice, pursuant to People v. Lumsden, 168 Mich App 286; 423 NW2d 645; lv app den 431 M 874 (1988).

JAMES C. KINSLEY, Circuit Judge

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED OCTOBER 7, 1997
v.	NO. 193881 Calhoun Circuit Court LC No. 95-002897-FC
ERIC CLYDE BALL, Defendant-Appellant.	

Before: O'Connell P.J., and MacKenzie and Gage, JJ.
PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). He was sentenced to a mandatory sentence of life in prison without the possibility of parole. Defendant now appeals as of right, and we affirm.

Defendant's conviction arose out of an incident in which defendant was a passenger in a car stopped by the police for a traffic violation. The police arrested the driver for lack of a driver's license and a registration violation, and they then searched the driver and defendant as well as the passenger compartment of the car. The police also called a canine unit to sniff the car. The dog indicated several areas were positive for the scent of narcotics, and the police, upon searching those areas again, discovered

over 650 grains of cocaine in a compartment behind the glove box of the car. Defendant moved to suppress the cocaine, arguing that the dog sniff was an invalid search in violation of his Fourth Amendment rights. The trial court denied defendant's
motion at an evidentiary hearing, and the cocaine was introduced as evidence in the subsequent trial.

I

Defendant first argues that the trial court erred in denying his motion to suppress the cocaine. The right not to be subjected to unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *People v Dewis,* 442 Mich 1, 9-10; 497 NW2d 910 (1993). If evidence is unconstitutionally seized, it must be excluded from trial. *Teny v Ohio,* 392 US 1; 88 S Ct 1868, 1875; 20 L Ed 2d 889 (1968). Generally a search conducted without a warrant is unreasonable; however, one of the recognized exceptions to the warrant requirement is a search incident to a lawful arrest. *Id.* Further, it is well settled that when an officer "has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and compartments therein, including glove compartments. *New York v Belton,* 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981); *People v Bullock,* 440 Mich *15,* 26; 485 NW2d 866 (1992). In the present case, because the officer had arrested the driver before searching the passenger compartment of the car, there was no error in the trial Court's finding that, at least as far as the officer's physical search of the car, it was a valid search incident to the arrest.

Defendant also argues that the dog sniff constituted a second search, which was unsupported by probable cause and therefore violated his right against being subjected to an unreasonable search. We review the trial court's ruling on a motion to suppress evidence for clear error. *People v Houstina,* 216 Mich App 70, 73; 549 NW2d 11(1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *People v Muro,* 197 Mich App 745, 747; 496 NW2d 401 (1993).

Upon review of the facts and relevant case law, we conclude that the trial court's decision to deny defendant's motion to suppress was not clearly erroneous. In *United States v Place,* 462 US 696; 77 L Ed 2d 110, 121; 103 S Ct 2637 (1983), the U.S. Supreme Court held that protection against unreasonable searches and seizures does not apply to the exposure of personal property to a trained canine, because such an investigation does not constitute a "search" within the meaning of the Fourth Amendment. This rule has been applied to police investigations of automobiles. In *People v Clark,* 220 Mich App 240, 243; 559 NW2d 78 (1996), a dog sniffed the trunk of the defendant's car after it had been lawfully stopped and the defendant had been arrested for driving with a suspended license. This Court ruled that the police acted legally in the decision to call a canine unit after the driver of the car had been arrested and the car was to be impounded. *Id* In the present case, there was no question that the car was lawfully detained for impounding after the driver had been arrested. Therefore, the dog sniff of the outside of the car did not constitute a constitutionally protected search. *Place, supra* at 121.

Further, the dog's positive indications on the outside of the car provided sufficient probable cause to permit the officers to search every part of the vehicle, under the automobile exception to the warrant requirement. See *People* v *Carter,* 194 Mich App 58, 60-6 1; 486 NW2d 93 (1992). Therefore, because the dog indicated a positive scent for drugs in the present case, probable cause to allow the dog to enter the car and to subsequently search the entire contents of the car, including the area behind the glove compartment where the cocaine was found, was established. We conclude that the trial court did not err in denying defendant's motion to suppress the cocaine.

II

Next, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. We disagree with defendant's position.

Defendant first contends that in his closing arguments the prosecutor misstated the testimony regarding the amount of cocaine seized and its total value. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen,* 201 Mich App 98, 104; 505 NW2d 869 (1993). Misconduct must be determined on a case-by-case basis, reviewing the prosecutor's comments in context. *People v Legrone,* 205 Mich App 77, 82; 517 NW2d 270 (1994). Upon review of the testimony, we find that the prosecutor did misstate the witness' testimony regarding the average price for a rock of cocaine. However, we conclude that the error was harmless in light of the court's cautionary instruction to the jury and the

prosecutor's reminder to the jurors that it was their job to determine the facts and remember the testimony. Similarly, we find no merit in defendant's argument that the prosecutor misstated the testimony regarding whether defendant voluntarily offered false identification. The record supports the prosecutor's statement, and the court correctly instructed the jury that lawyers do not testify and that the jury is responsible for recalling the correct testimony.

Defendant also moved for a mistrial based on statements by the prosecutor during closing arguments, which defendant argues vouched for the credibility of a witness and resulted in shifting the burden of proof from the prosecution to defendant. This Court reviews the trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger,* 221 Mich App 171, 175; 561 NW2d 463 (1997).

Our Supreme Court has held that a prosecutor may not vouch for the credibility of a witness to the effect that the prosecutor has some special knowledge concerning a witness' truthfulness. *People v Bahoda,* 448 Mich 261, 276; 531 NW2d *659 (1995).* However, it is not improper to argue that a witness should be believed. *People v Wise,* 134 Mich App 82, 104; 351 NW2d 255 (1984). Viewing the prosecutor's comments in context, we agree with the trial court's finding that the prosecutor was not vouching for the credibility of the witness but rather was stating to the jurors that they must determine whether to believe the witness. Further, the court instructed the jury on the prosecutor's burden of proof, and the prosecutor reiterated that the jury must determine the credibility of witnesses. We find that the trial court did not abuse its discretion in denying

defendant's motion for a mistrial based on prosecutorial vouching for a witness.

Similarly, defendant's argument that the prosecutor shifted the burden of proof to defendant lacks merit. The prosecutor employed a method of asking hypothetical questions to the jury to highlight the deficiencies in defendant's theory. We do not believe that the prosecutor's technique rose to a level requiring reversal. The jury was not left with the impression that defendant must respond to the hypothetical questions. See *People v Green,* 131 Mich App 232; 345 NW2d 676 (1983). Again, viewing the prosecutor's comments in context, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on improper burden-shifting.

Defendant asserts several other instances of prosecutorial misconduct for which he provides no argument and cites no authority regarding why the trial court's rulings were incorrect. Because defendant failed to sufficiently argue these claims, he has effectively abandoned them on appeal. *Dresden v Detroit Macomb Hospital,* 218 Mich App 292, 300; 553 NW2d 387 (1996).

III

Finally, defendant argues that the evidence presented was insufficient to support his conviction of possession with intent to deliver over 650 grams of cocaine. Defendant argues that the evidence was insufficient to prove possession or intent. We disagree. Conviction requires proof that defendant knowingly possessed the cocaine and had the intent to deliver it to someone else. *People v Wolfe,* 440 Mich 508, 516-517; 489

NW2d 748, amended 441 Mich 1201 (1992).

In reviewing a claim of insufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to prove the essential elements of the crime beyond a reasonable doubt. *Id.* at 515. This standard inherently precludes this Court from interfering with the factfinder's task of weighing the evidence or making determinations as to witnesses' credibility. *Id.* at 514-515.

First, the element of possession may be satisfied by actual, physical possession of the controlled substance or by constructive possession. *Id.* at 520. Constructive possession can be shown by knowledge of the presence of the cocaine coupled with the right to exercise control over it. *Id.* While a person's mere presence at a location where drugs are found is not enough by itself to establish constructive possession, many factors may be considered to find a sufficient nexus between the defendant and the drugs. *Id.* at 520-521. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521.

We find that there was sufficient evidence in the present case to find that defendant at least constructively possessed the cocaine. The cocaine was found in the glove compartment directly in front of where defendant had been sitting. A police officer testified that defendant told him that the car was borrowed from defendant's girlfriend, indicating the likelihood that defendant had some control over the car and its contents. Further, the driver of the car testified that defendant stated that he

had "dope" in the glove compartment. The driver also testified that defendant was involved with drug dealing on several similar trips. Viewing all of the evidence presented in the light most favorable to the prosecution, the evidence was sufficient for the jury's finding that defendant at least constructively possessed the cocaine.

There was also sufficient evidence to prove an intent to deliver. As with possession, actual delivery is not required to prove intent to deliver. *Id.* at 524. Surrounding circumstances such as the quantity of drugs recovered and the way in which the drugs are packaged can demonstrate an intent to deliver. *Id.* In the present case, evidence was presented regarding the average size and cost of one rock of cocaine and the total amount of cocaine discovered. There was also evidence of several pagers and cellular phones found in the car. Upon a careful review of the record, we conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to justify the jury's finding that defendant knowingly possessed the cocaine with the intent to deliver it.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage